United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-1424 76-1425

B P/S

United States Court of Appeals For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

LUGENIA BARNES and CHARLES THOMAS,

Appellants.

On Appeal From The United States District Court For The Southern District Of New York

Appellants' Brief

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- X

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-against-

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APPELLANTS' BRIEF

ISSUES PRESENTED

1. Whether the failure to advise Lugenia Barnes that she was a target of the investigation requires dismissal of the indictment.

2. Whether the admission into evidence of proof of a narcotics related homicide was error.

3. Whether the Government's summation, which demeaned the defense and vouched for its witnesses, was improper.

4. Whether the Court's determination of the issue of materiality denied appellants' due process of law.

PRELIMINARY STATEMENT

Appellants, LUGENIA BARNES and CHARLES THOMAS, appeal from a judgment rendered against them in the United States District Court for the Southern District of New York on September 15, 1976. Both Barnes and Thomas were charged with perjury (75 Cr. 888) and both were convicted after a

jury trial (Stewart, J.) Barnes was sentenced to four months and Thomas was sentenced to fifteen months. Charles Thomas is presently serving his sentence on a prior State conviction and Lugenia Barnes is on bail pending appeal.

STATEMENT OF FACTS

Lugenia Barnes and Charlies Thomas were charged with perjury in that they lied about matters material to a homicide investigation. The investigation pertained to the murder of two men in early August, 1975. The men were murdered and left in a U-Haul van where, on the 10th of August, their bodies were discovered by the police. Barnes, who had rented the van before the murders, reported the van stolen. The police investigating the reported theft took statements from Barnes and her boyfriend, Thomas about the circumstances of the theft.

The Government began an investigation into these murders and Barnes and Thomas were called before the Grand Jury. By stipulation with counsel, the Government limited its questioning solely to those matters covered by the prior statements given to the police. Thomas was warned that he was a target of the investigation, Barnes was not.

After testifying before the Grand Jury, both appellants were indicted and tried for perjury.

Prior to trial, appellant Barnes moved to dismiss her indictment on the authority of United States v. Jacobs,

531 F.2d 87 (2d Cir. 1976). This motion was denied.

Both appellants moved that the Government not be permitted to give evidence as to the murders, since it was argued, they had no relevance to the perjury. This motion was also denied.

The Trial

The Grand Jury testimony of appellants was offered into evidence (57-60).* The Grand Jury testimony of Barnes stated that on August 8, 1975 at about 1:00 p.m., she rented a 1969 Ford Van from the Gun Hill Service Station in the Bronx. She rented the Van for one day to move some clothing (B4).** After renting the Van she and Thomas drove around for about forty-five minutes so she could get used to driving the van (B6). They then stopped at his old apartment at 11 West 118th Street (B5). They checked the size of the van to see if her clothing would fit in it (B6). They then drove to Thomas' mother's house and then to a MacDonald's on 125th Street (B6). After eating, they drove back to Barnes' apartment on 184th Street and then on to her doctor's office at 182nd Street and Grand Concourse. They were late for the appointment and the doctor had gone, so they returned to Thomas' apartment (B7). At 118th Street they loaded the van

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* References are to the typewritten minutes of the trial.

** References to the Grand Jury minutes of Barnes are designated "B" and those of Thomas, "T".

and drove to Barnes' apartment on 184th Street (B8). They pulled up in front of the building and unloaded the truck. Not finding a parking space, Barnes left the car illegally parked in front of her apartment house (B9). At about 12:30 a.m., she and Thomas found a parking space on Valentine Avenue between 183rd and 184th Streets (B10). In attempting to place her keys in her purse, she accidentally lost them (B10). The next morning she noticed the van was missing, so she called the police and reported the van stolen (B11).

Thomas' Grand Jury testimony was substantially the same, except that he testified that at about 7:00 or 8:00 p.m., after unloading the truck at 184th Street, he parked the car at Valentine Avenue. He then returned to the apartment and went to sleep (T5). At about 1:00 a.m., he went to move the van and found it missing (T6). Later that morning they reported the van stolen (T6).

The Government then put into evidence the testimony of several witnesses that the van was parked at the location where the bodies were found, Claremont Avenue, from 3:00 p.m. on Friday the 8th until Sunday morning, when the bodies were discovered (70-76; 291-292; 324-328).

Next, the Government offered evidence to show that the odometer in the van showed that it had traveled fourteen miles since it has been rented, but the route described by Barnes and Thomas was a little more than thirty-four miles (147, 148, 203-224, 249-258).

Finally, the Government offered testimony that the van showed no signs of having been jump started or otherwise started without a key (127-131, 266).[1]

The defense called an expert witness who testified that there are seven or eight ways to illegally start a car and that there are methods of so doing which leave no signs (359-362).

ARGUMENT

POINT I

THE CONVICTION OF APPELLANT BARNES SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

Lugenia Barnes was never advised that she was a putative defendant or a target of the Grand Jury investigation. Charles Thomas was so advised. The failure to advise Barnes of her status requires a reversal of the conviction and a dismissal of the indictment.

Barnes was a target of the investigation

By stipulation with counsel, the questioning in the Grand Jury was to be limited to information that Barnes had already supplied to the New York City Police. The questioning,

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1. All of the Government's evidence was subjected to cross-examination which affected that evidence in varying degrees. In some instances, (i.e. the mileage on the van when rented by Barnes) there was considerable doubt as to the correctness of the Government's position. However, since no issue is raised as to the sufficiency of the evidence, the statement of facts herein concerns itself with the evidence given on the Government's case-in-chief.

in fact, was so limited. At the time of her Grand Jury appearance, the Government was already in possession of evidence that Barnes could not have taken the route she said and that during the critical period the van was parked in a location which was contrary to Barnes' statement. Thus, the Government knew or believed in the falsity of Barnes' statement before she testified. This evidence of falsity when coupled with the stipulation plainly shows that the Government was not attempting to gather information, but rather was attempting to ensnare Barnes into a perjury indictment.[2]

Moreover, the indictment itself refers to the scope of the inquiry as including Barnes' role in disposing of the dead bodies.[3] Clearly, Barnes was a target of the investigation.

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2. The calling of Barnes just to obtain a perjury indictment is, itself, grounds to dismiss this indictment. See Brown v. United States, 245 F.2d 549, 555 (C.A.8); United States v. Thayer, 214 F. Supp. 929 (D. Colo.); United States v. Cross, 170 F. Supp. 303 (D.D.C.)

3. Count 1 paragraph 3(e); Count 1 paragraph 2(a)(b)(c) and (d).

The failure to warn Barnes that she was a target of the investigation requires a reversal of the conviction.[4]

In United States v. Jacobs, 531 F.2d 87 (2d Cir., 1976) this Court was faced with a similar situation. There, the trial court relied upon the holding of United States v. Mandujano, 496 F.2d 1050 (5th Cir., 1974) to find that the failure to advise violated due process. However, this Court did not decide the issue on constitutional grounds, but rather affirmed the dismissal of the indictment solely under its supervisory powers. The Court of Appeals, at the time of the decision in Jacobs, was well aware that certiorari had been granted in Mandujano. Thus, the Court was also aware of the very real possibility that Mandujano would be reversed by the Supreme Court. Yet, because the Second Circuit wished to harmonize the procedures followed by the Strike Force (where no such warnings were given) with those of the Eastern and Southern District United States Attorneys' offices (where such warnings were given) it required that a putative

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4. The United States Attorney cannot argue that at the time of Barnes' Grand Jury appearance (Aug. 1975) the law did not require any advice to targets of investigation. In Jacobs, defendant's Grand Jury appearance was in 1974 and the Court of Appeals still affirmed the dismissal of the indictment. If anything, application is more appropriate here than in Jacobs, since in Jacobs the Court required the Strike Force, which did not give warnings, to do so. Here, the failure to advise Barnes did not comply with an already existing procedure in the Southern District.

defendant be so properly advised of his status.

Subsequent to the decision in Jacobs, the Supreme Court reversed Mandujano in United States v. Mandujano, 48 L.Ed. 2d 212 (1976). However, the decision in Jacobs is grounded solely in the supervisory powers of the Court, while Mandujano was decided on constitutional grounds. Thus, the decision in Mandujano is not controlling.

Subsequent to Mandujano, the Supreme Court granted certiorari in United States v. Jacobs, __U.S.___ (1976); 20 CrL 4053 and remanded the case to this Court for reconsideration in light of the decision in Mandujano. As the dissenting opinions point out, Mandujano is irrelevant to Jacobs and the majority opinion meaningless. Appellant urges this Court to adhere to its decision in Jacobs and reverse the conviction.

POINT II

THE ADMISSION INTO EVIDENCE PROOF OF THE DOUBLE HOMICIDE WAS PREJUDICIAL ERROR.

Prior to Trial, appellants moved for an order preventing the Government from offering proof as to the murder of two men who were Government informers in a narcotic matter. This motion was denied and the Government was permitted to offer such proof.[5]

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5. In light of this pre-trial ruling, the failure to move to strike those portions of the indictment dealing with the homicide was understandable.

No proper foundation was established for admitting this evidence on the issue of motive.

Below, the Government asserted that the mere presence of two dead bodies in the van rented by Barnes was a sufficient basis for admitting evidence of the homicide on the issue of motive to lie. This foundation was legally insufficient.

In the absence of an admission by a defendant, proof of knowledge of falsity can only be established by circumstantial evidence. From this evidence, the Jury must infer the accused's state of mind. Such an inference may come from proof of objective falsity itself, from facts which show the accused knew or did what he said he did not know or do, and from proof of a motive to lie. United States v. Camporeale, 515 F.2d 184 (2d Cir. 1975); United States v. Turcotte, 515 F.2d 145 (2d Cir. 1975); United States v. Sweig, 441 F.2d 114 (2d Cir. 1971).

Appellants do not contest the propriety of proof of a motive to lie, rather they contest such proof when it was offered without a proper foundation.

Here, the Government offered no proof that either appellant had any knowledge of the activities of the informers, or that they in any way knew of or participated in the homicides. Absent such proof, there is no connection between appellants and the deed, and in turn, in the absence of

such connection, no inference as to motive is permissible. The existence of a crime may provide a motive to fabricate, but only for those involved in the commission of that crime. Simply stated, without some showing of participation there can be no inference of a motive to fabricate, since the inference is predicated upon a desire to cover one's criminal act.

The proof at trial did not show that Barnes or Thomas had any involvement in the murder, nor even proof that they were even aware of the homicides. It must be remembered that the Grand Jury testimony was the same as the prior statements given on the 10th of August 1975. Thus, any motive to lie must have arisen prior to the 10th. To establish a basis for admissibility, the proof had to show that Barnes and Thomas participated in, or at least, that they were aware of the circumstances of the murders. At trial, the Government offered no such proof; instead, it relied solely upon the mere existence of the crime as a foundation for admissibility. This was incorrect and then should have been excluded. F.R. Ev.; rule 404(b); cf. People v. Fitzgerald, 156 N.Y. 253 (1898); People v. Namur, 309 N.Y. 488 (1966).

The probative value of the evidence offered was far outweighed by its prejudice.

Even if technically admissible, the evidence of the homicides and that the deceaseds were Government informants

working on narcotics investigations was so weak in probative value and so unnecessary to the Government's case that its prejudicial effect requires that it not be permitted into evidence. A trial court must weigh and balance the probative and prejudicial effect of evidence of other crimes to determine admissibility. F.R. Ev., Rule 403. Here, the probative value was slight and the prejudice great.

First, the Government had sufficient other avenues of establishing intent. The Government properly attempted to show intent from the objective falsity of the answers themselves and from facts which tended to prove the falsity. United States v. Sweig, 441 F.2d 114 (2d Cir. 1971); United States v. Chapin, 515 F. 2d 1274 (CADC, 1975).

As to objective falsity, the answers given before the Grand Jury were made on August 2[illegible], 1975, less than three weeks after the van was rented. August 10, 1975, some two days after the truck rental both appellants gave statements consistent with their subsequent Grand Jury testimony. Thus, there was a very brief time lapse between the event and the first recounting of what occurred. This fact alone obviated usual problems associated with proof of perjury (i.e. that the falsities may have been the product of a faulty memory caused by the passage of time, rather than the result of intentional fabrication). The answers given were about appellants' own activities which also reduced the possibility of mistake or lack of memory. Also, the responses

were direct; there was no attempt to avoid answering or being evasive.

Where an accused's perjury consists of an "I don't recall" answer the government's burden of establishing intent is plainly more difficult than in a situation involving direct answers. A detailed specific account of extremely recent personal activities is the strongest case for an inference of intent from the falsity itself.

The government also offered extrinsic evidence of falsity. Mr. Knight, Mr. Walker, and Mr. Lehman all testified[6] that the van was parked at locations which contradicted the Grand Jury testimony of Barnes and Thomas, The mileage on the van when rented was testified to by Mr. Jaffe, who rented the van to Barnes and Mr. Fogarty's testimony corroborated Mr. Jaffe.[7] The government also offered witnesses who testified that the van had not been tampered with.

Given the facts as established at trial, the probative value of proving intent by establishing the homicides (and the narcotics linked nature of the murders) has little probative value.

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6. This testimony was strongly impeached on cross-examination.

7. The mileage on the van, at the time of rental, was shrouded in doubt in light of the testimony relating to Mrs. Pierce's rental of the van after Mr. Fogarty. The testimony of Mr. Jaffe that the Price rental agreement was an error was far from conclusive.

On the other hand, the prejudice was monumental. The proof paraded before the Jury ugly and violent crimes with which the defendants were not charged.[8] Not only that, but the Jury also heard of narcotics activity about which the deceaseds might have been aiding the Government.[9] The Jury was left to speculate as to why these narcotics informants were killed and what role Barnes and Thomas played in both the narcotics trade and the homicides.

In United States v. Martinez, (Docket No. 73 Cr. 271, E.D.N.Y. March 17, 1976, Dooling, J.) the Court was faced with a similar problem. Defendant had testified before a Grand Jury that he had never seen one Frank Matthews. The Government intended to prove the falsity of these answers by showing that DEA agents had seen defendant with Matthews at two distinct locations. The Government also intended to offer evidence to link defendant and Matthews by showing that they were trafficking in narcotics together and necessarily knew each other in a relation that defendant was not likely to forget even after a lapse of ten months.

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8. In this context, the value of any limiting instructions is dubious. Krulewich v. United States, 336 U.S. 440 at 453 (1949) (concurring opinion of Jackson, J.); United States v. Rinaldo, 301 F.2d 576, 578 (2d Cir. 1962); United States v. Rivera, 496 F.2d 952, 953 (2d Cir. 1974).

9. What if the informants had been giving information about a plot to kill the President, would this be admissible to show motive to lie?

Defendants objected to this offer and asserted that showing any contacts between defendant and Matthews (without showing what occasioned them or what was said) was sufficient for the Government to prove its case and that the probative value in admitting this evidence was outweighed by the prejudice.

The Court resolved the issue by stating that defendant's position was correct.

> Showing that the links were in a narcotics chain is too prejudicially damaging provided the contacts between defendant and Matthews, direct and indirect, can be shown in redacted form. United States v. Martinez, supra, at p. 12.

It must be remembered that in Martinez the time lapse between event and the Grand Jury appearance was some ten months, here it was three weeks and here, Barnes and Thomas had given statements to the police within a day or two of the events. Thus, Martinez presented a much stronger case for the Government's position than here. Also, in Martinez the evidence was only about narcotics links, here, the evidence is both about narcotics trafficking and murders committed in furtherance of the narcotics trade.

Suffice it to say, this evidence really placed appellants on trial for crimes of which they were not charged. At the least, the jury was permitted to view the evidence of perjury through a glass clouded and darkened by speculations about violent criminal behavior linked to the drug

trade. This was hardly an atmosphere conducive to a fair appraisal of guilt or innocence on the perjury charges.

Here, where much of the Government's case was weakened by cross-examination[10] and where the jury took almost eight hours to reach a verdict, the effect of this evidence cannot be deemed harmless.

POINT III

THE GOVERNMENT'S SUMMATION WAS IMPROPER AND PREJUDICIAL

During its summation, the Government degraded the defense and testified on behalf of its case.

First, the Government stated that the defendants' summations were an attempt to divert the Jury from the truth and confuse the Jury. This effort to demean the motives of the defense rather than speaking to the evidence was improper and counsel immediately objected but was overruled (488). The failure of the Court to sustain the objection and admonish the Jury to disregard the comment was error. See, McDonnell v. United States, 457 F.2d 1049, 1052 (8th Cir. 1972); United States v. Gonzales, 488 F.2d 833 (2d Cir., 1973); People v. Lombardi, 20 N.Y. 2d 266 (1967); cf. United States v. Rapoport, __F2d.__ (2d Cir. slip op. 11/4/76 p. 423).

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10. The weaknesses in the Government's case did not arise in the context of intent but in the context of proof of falsity.

Second, the Assistant United States Attorney testified on summation that they did not call Mrs. Pierce as a witness because Mr. Jaffe told him that she did not rent that truck. This was objected to and the objection overruled (499). The Government, in effect, testified that Mrs. Pierce had not rented the van in question and also vouched for the truthfulness of Mr. Jaffe, one of its witnesses. Gradsky v. United States, 373 F.2d 706 (5th Cir. 1967); United States v. Murphy, 374 F.2d 651 (2d Cir., 1967) cert. denied 389 U.S. 836; People v. Lovello, 1 N.Y. 2d 436 (1956).

It must again be pointed out that this was a close case, with each factual allegation hotly contested. Moreover, the Jury deliberated from 1:15 p.m. to 9:00 p.m., almost eight hours on a relatively simple case involving only two defendants and few issues. Thus, these asserted errors were not harmless. Even if by themselves the improper comments on summation do not require reversal, in conjunction with the other errors asserted herein, a reversal is required.

POINT IV

THE TRIAL COURT'S FINDINGS OF MATERIALITY DENIED APPELLANTS DUE PROCESS OF LAW AND WAS ERRONEOUS

Prior to the reception of evidence, the District Court made a finding that the questions to which allegedly perjurious answers were given were material to the pending investigation. In its charge to the Jury, the trial court

instructed the Jury that the testimony alleged to be perjurious was material. Both appellants took exception to that portion of the charge and specifically stated the propriety of the Jury determining the issue (6[illegible], 549).

Proof of the materiality of the testimony in question is an essential element of the crime of perjury under 18 U.S.C. Section 1623.

The law in this Circuit holds that whether testimony is material is a question of law to be decided solely by the Court. United States v. Mancuso, 485 F.2d 275, 280 (2d Cir. 1973); United States v. Marchisio, 344 F.2d 653, 665 (2d Cir., 1975); United States v. McFarland, 371 F.2d 701, 703 n.3 (2d Cir. 1966), cert. denied 387 U.S. 906 (1967).

However, in light of the Supreme Court's decisions in Mullaney v. Wilbur, 421 U.S. 684, 696-702 (1975) and In re Winship, 397 U.S. 358 (1970), holding that the full burden rests upon the prosecution in all criminal trials to prove every essential element of the crime charged beyond a reasonable doubt, the element of materiality should, as all other elements of the crime, be a Jury determination. Moreover, even if materiality is an issue for the Court alone, the standard of proof must be beyond a reasonable doubt. There is no indication that this standard of proof was followed by the trial court in making its determination on materiality.

In the posture of this case, this issue is far from academic since there was a strong argument to be made that the Grand Jury testimony was irrelevant to the investigation. The Government agreed to ask only about information which had already been supplied to the New York Police and, in turn, given to the Government. Thus, except for the perjury indictments, nothing was to be gained by the testimony of appellants. Therefore, the ruling of the Court on materiality was erroneous, United States v. Freedman, 445 F.2d 1220 (2d Cir. 1971), and denied appellants due process of law.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE INDICTMENT AGAINST APPELLANT BARNES DISMISSED

Respectfully submitted,

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AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 19 day of Nov. ,19 76 at No. 1 St. Andrews Pl. NYC

deponent served the within Brief upon U.S. Atty., So. Dist. of N.Y.

the Appellee herein, by delivering true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me this
19 day of Nov. 1976.

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978